Reg. No. GR/RNP/GOA/32

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Panaji, 22nd November, 2007 (Agrahayana 1, 1929)

SERIES II No. 34

OFFICIAL GAZETTE

GOVERNMENT OF GOA

SUPPLEMENT

GOVERNMENT OF GOA

Department of Labour

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Notification

No. 28/18/2007-LAB/863

The following Award passed by the Industrial Tribunal of Goa, at Panaji-Goa on 11-7-2007 in reference No. IT/54/2003 is hereby published as required by Section 17 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947).

By order and in the name of the Governor of Goa.

Hanumant T. Toraskar, Under Secretary (Labour).

Porvorim, 22nd August, 2007.

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IN THE INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT-I AT PANAJI

(Before Shri Dilip K. Gaikwad, Presiding Officer)

Case No. IT/54/2003

Yvonne Menezes,
House No. 846,
Bambordem, Moira,
Bardez, Goa. … Workman/Party I

V/s

M/s. Thomas Cook India Ltd.,
With Branch Office at
Municipal Market,
D. B. Bandodkar Marg,
Panaji, Goa. … Employer/Party II

Workman/Party I - Represented by Adv. V. A. Lawande.

Employer/Party II - Represented by Adv. A. Nigalye.

AWARD

(Passed on this 11th day of July, 2007)

This is a reference under Section 10(1)(d) of the Industrial Disputes Act, 1947 (in short hereinafter referred to as the said Act, 1947).

1. Facts giving rise to the present reference, stated in brief, are as follows:

The Government of Goa in exercise of powers conferred on it by Section 10(1)(d) of the said Act, 1947 under Order dated 18-8-2003 has referred to this Tribunal following dispute for adjudication-

"(1) Whether the action of the management of M/s. Thomas Cook (India) Ltd., Panaji, Goa in terminating the services of Mrs. Yvonne Menezes, Cashier-cum-Clerk, with effect from 30-9-1995, is legal and justified?

(2) If not, to what relief the workperson is entitled?"

2. On receipt of the reference, notices were issued to both parties. In response to the notices, both parties put their appearance in this Tribunal. The Party I filed her claim statement on 10-11-2003. Same is at Exb. 4. It appears from claim statement that the Party II which is a public limited company is dealing with business of Travel, Tours, Foreign Exchange and Insurance with its Head Office at Dr. D. N. Road, Fort, Mumbai. The Party I was appointed with the Party II as a Vocational Trainee for a period of one year w.e.f. 27-5-1994. The appointment was without issuing appointment letter. Though the Party I was appointed as Vocational Trainee, infact, she was performing duties of Foreign Exchange-cum-Cashier. Manager of the Party II told the Party I after completion of the period of one year that she is confirmed in the service. The Party I was performing her duties efficiently and with her best ability.

3. Further, it appears from the claim statement that the Party II orally terminated services of the Party I

without reason w.e.f. 30-9-1995. The letter of termination dated 28-8-1995 is served upon the Party I on 6-10-1995. The Party I came to know from this letter that termination of her service is as per clause Nos. 1 & 3 stated in appointment letter. The Party I by sending letter dated 26-12-1995 requested the Party II to disclose reasons for termination of her service. The Party II informed the Party I that her performance was not satisfactory and that she has committed misconduct. Neither the show cause notice was issued nor charge--sheet was served against the Party I before termination of her service. The Party I claims that termination of her service is illegal, unjustified, against principles of natural justice and in violation of provisions contained in the said Act, 1947. The termination has caused stigma on her character. She raised dispute under letter dated 4-3-1996 before the Asstt. Labour Commissioner. During pendency of the proceeding for reconciliation, the Party II produced her appointment letter dated 25-5-1995 and letter of resignation dated 13-6-1996. She was in need of money. The Party II was not ready and willing to pay money out of contribution paid by her towards Provident Fund. Therefore the resignation letter was signed by her. In fact she never intended to resign from the service. The dispute which was raised before the Asstt. Labour Commissioner could not be settled. The Asstt. Labour Commissioner recorded failure. Therefore, the Government of Goa has referred the dispute to this Tribunal for adjudication as stated earlier.

4. The Party I in her claim statement has prayed for declaration that the termination of her service by the Party II is illegal, for setting aside termination of her service and for reinstatement in the service with full back wages.

5. The Party II presented its written statement on 12-1-2004 at Exb. 6. It appears from written statement that the Party II for purpose of conducting the business has employed various categories of employees in the grades of Managers, Clerks, Cashiers and Peons etc. The Party II appointed the Party I by letter dated 6-5-1994 under Vocational Trainee Scheme which aims to impart knowledge of travel and tours to young Indians. The appointment of the Party I as Vocational Trainee was for the period of one year with effect from the date of her joining in Foreign Exchange Branch, situated at Goa. The Party I joined her service as Vocational Trainee on 27-5-1994. She completed her training on 26-5-1995. She came to be relieved from service on 27-5-1995 on completion of her training period. Thereafter the Party II appointed the Party I as a Cashier-cum-Clerk w.e.f. 1-6-1995 under its letter dated 25-5-1995. Appointment of the Party I as Cashier-cum-Clerk was initially on probation for a period of six months. The Party II reserved its right under the appointment letter dated 25-5-1995 to terminate service of Party I without notice and without assigning any reason during period of probation. The Party I was called upon on 5-6-1995 to submit application for employment form and Provident Fund nomination form duly signed and duly filled in. She was further called upon to submit xerox copies of educational qualification, mark-sheets and certificates showing her birth date. She was directed to go through medical examination by the company's doctor as part of terms set out in appointment letter dated 25-5-1995. The Party I submitted copy of mark-sheet of third year of Bachelor of Arts examination. The Party II became doubtful about authenticity of the mark-sheet. Therefore, the Party II made inquiries with the Bombay University. The Party II came to know from the Bombay University that, seat number shown in the mark-sheet was allotted to some other person, and that, it was fake mark-sheet which was submitted by the Party II. By way of submitting such mark-sheet the Party I tried to mislead the Party II that she has completed graduation in the month of May, 1995. She did not submit employment form and related papers inspite of repeated instructions. Therefore, the Party II terminated her service by letter dated 28-8-1995 in terms of clauses 1 & 3 set out in the appointment letter. Termination of service of the Party I is legal, just and bonafide.

6. Further, it appears from written statement that the Party I was not performing duties of the Foreign Exchange-cum-Cashier. The Party I was paid with stipend and not salary during period of training. The Manager of the Party II did not inform the Party I that she is confirmed in service. Performance of the Party I during the probation period was not satisfactory. She submitted fake mark-sheet to show that she has passed graduation in the month of May, 1995. Because of the fake mark-sheet the Party II lost confidence in the Party I. Notice of termination dated 28-8-1995 which was offered by Manager was not accepted by the Party I on 30-9-1995. Therefore the Manager served termination notice on the Party I through employees on 6-10-1995. The termination notice does not cause stigma on character of the Party I. She is in gainful employment since after termination of her service. On these and above grounds, the Party II has entreated for rejection of reference.

7. The Party I submitted rejoinder on 5-3-2004 at Exb. 7. She has denied in seriatim all contentions which are raised by the Party II in its written statement and which are adverse to her. She asserted that she had made application to the Party II for the post of Foreign Exchange Assistant/Cashier. She was called upon for written test and group discussion. She had made it clear in the application that she has passed only SSC examination. The Party II selected her on basis of her performance in the open discussion and because she had experience in handling matter concerning foreign exchange, travel tours and front office in her previous job in Hotel Fidalgo. The letter dated 25-5-1995 produced by the Party II during conciliation proceeding and which is in the shape of her appointment letter is fabricated. She had stated in the application that she had passed only SSC examination and therefore question of submitting of mark-sheet of T.Y.B.A. examination does not arise. It is the Party II which has fabricated the mark--sheet. The termination of her service is without holding inquiry, without giving opportunity and it is punitive in nature.

8. On basis of pleading of both parties, the then learned Presiding Officer framed issued on 13-4-2004 at Exb. 8. The issues are as follows:

(1) Whether the Party I proves that the action of the Party II in terminating her services w.e.f. 30-9-1995 is illegal and unjustified ?

(2) Whether the Party II proves that the Party I was a probationer and her services were terminated in terms of the letter of appointment ?

(3) Whether the Party II proves that the Party I is gainfully employed from the date of termination of her service ?

(4) Whether the Party I is entitled to any relief ?

(5) What Award ?

9. My findings on the above issues are as follows:

Issue No. 1: In affirmative.
Issue No. 2: Party I was probationer, termination of service is not proved to be in terms of appointment letter.
Issue No. 3: In negative.
Issue No. 4: In affirmative.
Issue No. 5: As per final order.

REASONS

10. *Issue No. 1:* Admittedly, the Party II which is a public limited company is carrying on business of travel, tours, foreign exchange and insurance through its various branches situated in different parts of India. Head office of the Party II is at Dr. D. N. Road, Fort, Mumbai. The Party II published advertisement in daily newspaper, "The Navhind Times" dated 22-3-1994 and invited applications for the post of Foreign Exchange Assistant/Cashier for its branch situated at Goa. It was condition that the applicant must be smart, first class commerce graduate with two years experience, familiar with cash handling excellent communicator with an ability to provide the very highest standard of customer service. The newspaper is at Exb. W-11. In response to this advertisement the Party I made an application for the post of Foreign Exchange Assistant/Cashier by making it clear in the application that she is SSC qualified. She was called for interview and for group discussion on 18-4-1994 by letter dated 13-4-1994. Xerox copy of the letter is at Exb. W-1. She had experience in handling matter concerned with Foreign Exchange, travel, tours and front office in Hotel Fidalgo. Therefore, the Party II appointed her w.e.f. 27-5-1994.

11. The Party I purposely intended to disclose in the affidavit in evidence (Exb. 12) the post on which she was appointed by the Party II. She has stated in para No. 1 of the claim statement itself that she was appointed as Vocational Trainee for the period of one year. She completed training period by the end of 26-5-1995. She came to be appointed as a Cashier-cum-Clerk by the Party II w.e.f. 1-6-1995. Xerox copy of the appointment letter is at Exb. E-6. The Party II terminated her service by letter dated 28-8-1995 with immediate effect. Xerox copy of the termination letter is at Exb. W-4. The Party I challenged termination of her service by raising dispute before the Asstt. Labour Commissioner, Panaji, Goa. The parties could not reach at settlement. As a result, proceeding ended in failure. This fact becomes clear from xerox copy of minutes of conciliation proceeding held on 3-3-1997 by the Asstt. Labour Commissioner and which is at Exb. W-6. Therefore, the Government of Goa has referred the dispute to this Tribunal for adjudication.

12. The Party I in support of her case filed her own affidavit in evidence at Exb. 12. It appears from the affidavit that she was doing work of Foreign Exchange--cum-Cashier with the Party II. She was doing the work very efficiently and with the best of her ability. After completion of the period of one year, Manager of the Party II told her that she is confirmed in the service, and that, the confirmation letter will be shortly issued by the head-office. In fact, such confirmation letter is never given to her. The Party II terminated her service without giving opportunity to her and in violation of principles of natural justice. Termination of her service is illegal and unjustified. It is stigmatic and punitive in nature.

13. The Party II filed affidavit of the then Branch Manager, Aashutosh Akshikar and of Miss Maharukh M. Dosabhai who is working as General Manager (Human Resources) in its head office at Mumbai. These two affidavits which are filed in evidence are at Exb. 20 and Exb. 15 respectively. It appears from affidavit filed by the Branch Manager at Exb. 20 that, after completion of period of one year with effect from 27-5-1994 till 26-5-1995 as Vocational Trainee, the Party I was relieved from service w.e.f. 27-5-1995. The Party II paid stipend to the Party I during the training period. The Party I was appointed as Cashier-cum-Clerk w.e.f. 1-6-1995. Appointment was initially on probation for a period of six months as per letter dated 25-5-1995. The Party II had reserved its right under this appointment letter to terminate service of the Party I without notice and without assigning any reasons whatsoever during the probation period. On 5-6-1995 the Party I was advised to submit application for employment form and nomination form duly signed and filled in. She was further called upon to furnish xerox copies of educational qualification, mark-sheet and of certificate showing her birth date. She was directed to get medically examined through doctor appointed by the company as part of terms of the appointment letter dated 25-5-1995. The Party I submitted mark-sheet of T.Y.B.A. examination. The Party II became doubtful about authenticity of the mark-sheet. Therefore, the Party II made inquiry with Bombay University. It was informed by the University that the seat number shown in the mark-sheet was allotted to some other person. The mark-sheet submitted by the Party I was fake, to show that she had completed graduation in the month of May, 1995. The Party I was not confirmed in service. Performance of the Party I in discharging her duty was not satisfactory. Therefore, the Party II terminated service of the Party I by letter dated

28-8-1995 in terms of clauses 1 & 3 of appointment letter. Termination of her service is legal, just and proper. Termination does not bring the Party I in disrepute and does not cause stigma on her character.

14. Evidence of the witness Miss Maharukh Dosabhai which is in the form of affidavit (Exb. 15) is more or less the same with that of the witness Aashutosh Akshikar and which is also in from of affidavit Exb. 20. It is needless to reproduce evidence of the witness Miss Maharukh Dosabhai.

15. The witness Aashutosh Akshikar is cross examined partly by learned advocate of the Party I. Since thereafter this witness did not submit himself for further cross examination. It follows that the Party I could not completely test evidence of this witness by way of cross-examination. Only on this ground I hold that evidence of this witness which is led in the form of affidavit (Exb. 20) will have to be negatived. Resultant position is that there is evidence of the witness of Miss Maharukh Dosabhai alone on behalf of the Party II. She had authorization by old Board of Directors of the Company to appear in this matter. There is no such authorization in her name by new Board of Directors. On this ground, learned advocate of the Party II submitted that evidence of this witness also should not be accepted. He relied upon decisions given by Hon'ble High Court of Madras in case of *Indian Commerce and Industries Pvt. Ltd., v/s Swadharma Swarajya Sangha, reported in 1998 Company Cases 719, by the Hon'ble High Court of Himachal Pradesh* in case of *Apple Valley Resort v/s H. P. State Electricity Board and another, reported in 2004, Volume 118, Company Cases, page 328,* and by *the Hon'ble High Court of Andhra Pradesh in case of Swastik Coaters Pvt. Ltd., v/s Deepak Brothers and another, reported in 1997, Company Cases Vol. 89 page 564.*

16. The Hon'ble High Court of *Madras held in case of Indian Commerce and Industries Pvt. Ltd., v/s Swadharma Swarajya Sangha* that–

> *"in the absence of a resolution of the board of directors, the filing of the suit for ejectment, by the director in question, was not competent."*

17. *The Hon'ble High Court of Himachal Pradesh held in case of Apple Valley Resort v/s H. P. State Electricity Board and another* that:

> *"unless a power to institute an action is specifically conferred on a particular director, he would have no authority to bring an action on behalf of the company."*

18. *The Hon'ble High Court of Andhra Pradesh held in case of Swastik Coaters Pvt. Ltd., that:*

> *"One of the directors can present a complaint if there is a proper authorization in favour of such a director."*

19. The above decisions speaks in one chorus that there should be authorization in favour of the Director, by the Directors to bring an action on behalf of the Company. In the present case, witness Miss Maharukh Dosabhai is General Manager (Human Resource) of the Party II-Company. She did not produce authorization which is alleged to have been given in her favour by the old Board of Directors. The written statement which is filed on behalf of the Party II is under her signature. The Party II did not challenge in its rejoinder that the witness Miss Maharukh Dosabhai has authority to file written statement and to appear in this proceeding on behalf of the Party II. Defence taken by learned advocate of Party I is after-thought. The reported cases placed before me by him were under Indian Companies Act, 1956. Such is not position in the present case. I, therefore, do not agree with argument advanced by him.

20. Xerox copy of letter dated 28-8-1995, produced at Exb. W-4 makes it clear that the Party I at the time of termination of service was working as Cashier-cum-Clerk and that her service is terminated by the Party II as per clause Nos. 1 & 3 of the appointment letter dated 26-5-1995. Now I refer the clause Nos. 1 & 3 from the appointment letter of which xerox copy is at Exb. E-6. Clause No. 1 is as follows:

> *"You will be on probation for a period of six months in the first instance. During this period you will be expected to attain the standard required by the Company as to your work, attendance and conduct and you should also receive satisfactory references. Failing this, the Company may, at its discretion extend the probationary period for a further term upto three months or terminate your services by giving you twenty-four hours notice."*

Clause No. 3 from the said appointment letter runs like this:

> *"During your probationary period the Company reserves the right to terminate your services without notice and without assigning any reasons whatsoever and you will not be entitled to claim any compensation or allowance whatsoever."*

21. Learned advocate appearing on behalf of the Party I pointed out in his argument that the letter of appointment as Cashier-cum-Clerk and of which xerox copy is at Exb. A-6 was not given to the Party I. It was the oral appointment of the Party I as Cashier-cum-Clerk by the Party II. There was no occasion for the Party I to know the clauses set out in the appointment letter. In reply, learned advocate of the Party II tried to explain that the Party I refused to accept the appointment letter, and therefore, it was not given to her. Therefore the Party I cannot say that she does not know the clauses set out in the appointment letter.

22. There is no evidence in the form of acknowledgement to show that the appointment letter was given to the Party I at the time of her appointment as Cashier-cum-Clerk. When the Party I was appointed as Cashier-cum-Clerk in establishment of the Party II it

cannot be believed by any stretch of imagination that she would have refused to accept the appointment letter. In case of refusal to accept the appointment letter, the Party II certainly would not have continued the Party I in service. Explanation given by learned advocate of Party II is after thought and is devoid of merits. Since there is no documentary evidence on behalf of the Party II in the form of acknowledgment from the Party I, submissions made by learned advocate of the Party I that the letter of appointment as Cashier-cum--Clerk was not given to the Party I appears to be probable.

23. The Party II by its letter dated 26-12-1995 informed the Party I reasons for termination of her service. Xerox copy of the letter is at Exb. W-5. The reasons are as follows:

"(1) You have failed to give and also not signed the duplicate copy of the appointment letter accepting the terms and conditions of service.

(2) On verification from the Bombay University, the credentials of the TYBA mark-sheet submitted by you are in doubt. You were well aware that for your position as a Cashier--cum-Clerk in the organization, graduation is a pre-requisite as per Company policy.

(3) During your probationary period, your services were not found to be satisfactory. You have retained a lot of important correspondence in your desk and not handed over the same to the Branch Manager. All correspondence in your matter too was found in your drawers and apparently the letters sent from Head Office never reached the Branch Manager.

It is further stated in the above letter dated 26-12-1995 that the Party I is guilty of suppressing material facts and documents from reaching the Branch Manager and as a result timely action was not taken on vital matters concerning the Company's interests.

24. From the reasons stated in the letter dated 26-12-1995 (Exb. W-5) it can easily be gathered that termination of service of the Party I is on the ground that her performance was not satisfactory and also on the ground of misconduct. Service of the Party I is terminated before completion of the probation period which was w.e.f. 1-6-1995. Termination of her service is within three months apparently from date of appointment as Cashier-cum-Clerk. Therefore, question which arises for consideration is as to whether in such case validity of the order of termination can be decided by the Industrial Tribunal. To make this position clear it is inevitable to have reference of decision given by the Hon'ble Supreme Court in case of *Management of Brook Bond India Pvt. Ltd., Appellant v/s Y. K. Gautam, Respondent, reported in 1973 AIR (SC)-0-2634* and which is placed before me by learned advocate of the Party II. The Hon'ble Supreme Court held in this reported case that–

> *"there can therefore, be no doubt that the Tribunal can, in a case where an industrial dispute is raised, go into the question of the validity of the order of termination, even in the case of a probationer whose services have been dispensed with before the probation expired without assigning any reasons."*

In the present case the Party I has raised industrial dispute that her service is terminated by letter dated 28-8-1995 without assigning any reason. Therefore, relying upon decision given by the Hon'ble Supreme Court and which is reproduced above, I hold that the question of validity of termination of service of Party I can be looked into by the Industrial Tribunal.

25. Learned advocate appearing on behalf of the Party II argued that the Party II did not give reasons in the termination letter dated 28-8-1995. The Party II disclosed the reasons afterwards, that is, under letter dated 26-12-1995 (Exb. W-5). The reasons which are disclosed afterwards should not be taken into consideration. Therefore, according to him, only on basis of the letter of termination dated 28-8-1995, it will have to be held that termination of service of the Party I is without assigning any reasons. Argument advanced by him can very easily be dispelled by making reference of decision given by the Hon'ble Supreme Court in case of *Gujrat Steel Tubes Ltd., and others, Appellants v/s Gujrat Steel Tubes Mazdoor Sabha and others,* Respondents, reported in *(1980) II SCC 593.* The Hon'ble Supreme Court held that–

> *"The court will find out from other proceedings or documents connected with the formal order of termination what the true ground for the termination is. If, thus scrutinized, the order has a punitive flavour in cause or consequence, it is dismissal. If it falls short of this test, it cannot be called a punishment. To put it slightly differently, a termination effected because the master is satisfied of the misconduct and of the consequent desirability of terminating the service of the delinquent servant, is a dismissal, even if he had the right in law to terminate with an innocent order under the standing order or otherwise. Whether, in such a case the grounds are recorded in a different proceeding from the formal order does not detract from its nature. Nor the fact that, after being satisfied of the guilt, the master abandons the enquiry and proceeds to terminate. Given an alleged misconduct and a live nexus between it and the termination of service the conclusion is dismissal, even if full benefits as on simple termination, are given and non-injurious terminology is used."*

Relying upon the above decision, I hold that even though the reasons for termination of service of Party I are separately recorded and disclosed in letter dated 26-12-1995 those reasons can be taken into consideration to find out what are true grounds for

termination. I do not agree with argument advanced by learned advocate of the Party II.

26. Learned advocate of the Party II argued that the Party I has raised industrial dispute by claiming herself to be a workman. Initially she was appointed as Vocational Trainee under the scheme. Evidence led by the Party I does not disclose the duties as Vocational Trainees to prove herself to be a workman within parameters of the definition of workman. Therefore the Party I is not entitled to raise the dispute to claim that, termination of her service is illegal and unjustified. In support of his argument he relied upon decision given by the Hon'ble Supreme Court in case of *Mukesh K. Tripathi, Appellant v/s Senior Divisional Manager, LIC and others, Respondents, reported in 2004 8 SCC 387.* The Hon'ble Supreme Court held in this case that–

> *"a person to be a workman under the Industrial Disputes Act, must be employed to do the work of any of the categories viz. manual, unskilled, skilled, technical, operational, clerical or supervisory for hire or reward, and the same must be established even if a person does not perform managerial or supervisory duties."*

27. It appears from decisions given by the Hon'ble High Court of Bombay in case of *Northcote Nursing Home Pvt. Limited and others, Petitioners v/s Dr. (Ms.) Zarine H. Rahina and others, Respondents, reported in 2001 LAB I C 2605* that it, is for the employee to prove that the duties performed by her fall within parameters of the definition of workman. Relying upon this decision it can safely be said that burden of proof lies on the workman to prove that he is a workman as defined under Section 2(s) of the Industrial Disputes Act, 1947.

28. It is true that the evidence of the Party I as Vocational Trainee does not disclose nature of the duties which were to be performed by her. In my view, the Party II was in better position to produce the Vocational Trainee Scheme and to disclose nature of the duties of the Party I as Vocational Trainee. Nothing such has been done by the Party II. It has come in evidence of the Party I that even though her appointment was as Vocational Trainee, she was performing duties as Foreign Exchange-cum-Cashier. Such type of duty comes within parameter of the definition of the workman. I, therefore, hold that the Party I is a workman as defined under Section 2(s) of the said Act, 1947.

29. Learned advocate of the Party II argued that the Party I was initially appointed as Vocational Trainee under the Vocational Trainee Scheme of the Company. The Party I completed training on 26-5-1995. Thereafter she was given fresh appointment w.e.f. 1-6-1995 under letter dated 26-5-1995. Services of the Party I came to be terminated when she was on probation after appointment w.e.f. 1-6-1995 as Cashier-cum-Clerk. By claiming termination of service as illegal and unjustified the Party I who was initially appointed as Vocational Trainee is making efforts to be in regular service of the Party II. Therefore he urged that the Party I is not entitled to challenge the termination of her service. He relied upon decision given by the Hon'ble High Court of Judicature at Bombay in case of *Petroleum Employees Union, Petitioners v/s Indian Oil Corporation Ltd., & Ors., Respondents, reported in 2001 I CLR 785.* In this reported case the employees who were trainees were in fact on regular work. They had completed 240 days service. Therefore the petitioner Union filed writ petition on their behalf for regularization of their service. It was the case of the respondents that the employees persons under the scheme were given training, and that the persons were trainees and not employees. The Hon'ble High Court of Bombay pleased to hold that these persons/candidates who were 22 in number are given training as per the training scheme of the respondent, that, they had accepted the scheme and acted upon it, and that, at fag end of training they have come out to say that they be treated as regular employees which would amount to backdoor entry. The Hon'ble High Court further held that the petition is without substance. Facts of this reported case are totally different from that of the present one. The Party I has claimed that the termination of her service is illegal and unjustified, and therefore, she prayed for reinstatement in the service. With respect I am of the opinion that decisions relied upon by learned advocate of Party II from this reported case is not applicable. The Party II as stated earlier neither produced the Vocational Trainees Scheme nor gave details as to how the training was imparted to the Party I. In absence of production of the Vocational Trainee Scheme and of giving details to show as to whether training was given to the Party I, it will not be correct to conclude that the training scheme was acted upon by the Party I, and that, therefore she is not entitled to challenge the termination of her service. I do not agree with the argument advanced by learned advocate of the Party II.

30. If letter of termination (Exb. W-4) and reasons given by the Party II in its letter dated 28-12-1995 (Exb. W-5) for termination of service of the Party I are taken together, prima facie it appears therefrom that the termination is stigmatic and punitive in nature. Learned advocate representing the Party II to show that the termination is not of such nature relied upon various decisions which are necessary to be referred.

31. In case of *Management of Ti Diamond Chain Ltd., Petitioner v/s Presiding Officer, Labour Court, & Anr. Respondents, reported in 2003 I CLR 57* respondent No. 2 was appointed as trainee for a period of three years. The letter of appointment provided that trainee will be on job in the various department of the factory. The respondent No. 2 was warned for unauthorized absence. His attendance and performance were not satisfactory, therefore, he was not given regular employment. The petitioner brought his training to an end. The respondent No. 2 raised industrial dispute against the cessation of training. The dispute was referred for adjudication by the Labour Court, Madras, who in turn passed award holding that the petitioner

has not produced any training scheme or rules and regulations for engaging trainees. The Petitioner was directed to reinstate the second respondent with back wages. Therefore, the petitioner challenged the award on writ petition. The Hon'ble High Court of Madras held that the respondent No. 1 was apprentice which is different from the status of regular workmen. The appointment order provided for termination without notice, therefore, denial of service after training is not punishment.

32. Facts of the case of *Management of Ti Diamond Chain Ltd.,* referred to above are clearly distinguishable from that of the present one. In the present case the service of the Party I is terminated during the period of her probation and not during training period. As stated earlier, there is no evidence on behalf of the Party II to show that the letter of appointment of the Party I as Cashier-cum-Clerk on probation was given to her. Under this circumstance, the Party II is not entitled to take benefit of the clause Nos. 1 & 3 contained in the letter of appointment dated 26-5-1995. I, therefore, with respect, hold that the decision relied upon by the learned advocate of the Party II from the case of *Management of Ti Diamond Chain Ltd.,* referred to above and relied upon by learned advocate of Party II is not applicable to the present case.

33. In case of *Abijeet Gupta, Appellant v/s S.N.B. National Centre, Basic Sciences and others, Respondents, reported in (2006) 4 SCC 469,* the appellant was appointed as an Administrative Officer in the respondent institution in the year 1995. His appointment was on probation for a period of one year. From time to time he was served with letters pointing out his deficiencies. His probation period was also extended from time to time. By letter dated 7-4-1998 he was informed that his service was "unsatisfactory in the areas of drive, initiative, promptness and leadership", and that, dispute being advised verbally and through letter what were deficiencies in his work, he had shown no improvement. Pointing out certain other deficiencies, the letter added that his service was found to be unsatisfactory and that he was not suitable for confirmation. Consequently, his probation period was not extended further. Single judge of the High Court quashed order. Division Bench reversed decision. Hence the appellant took up the matter before the Hon'ble Supreme Court by way of appeal. The Hon'ble Supreme Court rejected the contention of the probationer that his termination was stigmatic and not simplicitor. In the present case, though it is stated in the letter dated 26-12-1995 (Exb. W-5) that, during probation period services of the Party I were not found to be satisfactory, there is no evidence on behalf of the Party II to show that this deficiency was brought to notice of the Party I. Her services came to be terminated before completion of the probation period which, according to the Party II, was of six months. One more ground and which is of serious in nature, given for termination of service of the Party I is that, credentials of the TYBA mark-sheet submitted by the Party I are in doubt. These facts and facts of the reported case of *Abijeet Gupta* are clearly different from each other. Therefore, with respect I am of the opinion that decision from this reported case and which is relied upon by learned advocate of the Party II will not be helpful to decide nature of the termination of service of Party I.

34. The Hon'ble Supreme Court held in case of *State of U. P. & Ors., Appellant v/s Ashok Kumar, Respondent, reported in 2006 I CLR 259* that–

> *"when a trainee is terminated during training period for adopting unfair means in training and no stigma was attached to termination order, it being termination simplicitor, there was no violation of Art. 311 of the constitution."*

It appears from facts of this reported case that services of temporary recruit were no longer required and therefore on this ground his services were terminated from the date of receipt of the termination notice. In the present case, though the letter dated 28-8-1995 (Exb. W-4) does not disclose reasons, if this letter is read along with subsequent letter dated 26-12-1995 (Exb. W-5) it becomes crystal clear that service of the Party I as stated earlier is terminated on the ground that her performance was not satisfactory and also on the ground of misconduct which is alleged to have been committed by the Party I in the form of furnishing alleged fake mark-sheet of T.Y.B.A. examination. These facts are different from that of the reported case of *State of U. P. and Ors.*

35. Learned advocate of the Party II pointed out in his argument that essential qualification for the appointment for post of Cashier-cum-Clerk was that the candidate should be graduate in commerce. The Party I furnished mark-sheet of T.Y.B.A. examination to show that she has completed graduation. The Party II became doubtful about authenticity of the said mark-sheet. Therefore, the Party II sent the mark-sheet for verification to the Bombay University. The Party II came to know from the University that it is the fake certificate which was furnished by the Party I. Learned advocate of the Party I strongly attacked the allegation made against the Party I by the Party II. It is evident that the witness Aashutosh Akshikar was Branch Manager of the office in which the Party I was working as Cashier-cum-Clerk. It is the case of the Party I that she never furnished the mark-sheet of T.Y.B.A. examination. She alleged that such mark-sheet is brought into the existence by the Party II only with a view to terminate her service and to accommodate in the service, Miss Pretam Dessai who is of wife of the Branch Manager, Aashutosh Akshikar. The witness Miss Maharukh Dosabhai admitted in para 6 of the cross examination that the said Miss Preetam Dessai is appointed after termination of service of the Party I. Though she disclosed that the appointment of Miss Preetam Dessai is not immediately after termination of service of the Party I, and that, the said Branch Manager, Aashutosh Akshikar had already left the branch before appointment of Miss Preetam Dessai, fact that the said Preetam

Dessai who is sister-in-law of the then Branch Manager Aashutosh Akshikar is appointed after termination of services of the Party I remains there. The affidavit (Exb.15) filed by the witness Aashutosh Akshikar shows that since the month of July, 1996 he is working as Head of Travel Management in establishment of the Party II at Mumbai. It follows that he is in service with the said Company after he left the Branch situated at Goa. Therefore, the fact that he had already left the Branch before appointment of his sister-in-law, will not make much difference.

36. Allegation of misconduct attributed to the Party I is on the ground that she has furnished fake mark-sheet of T.Y.B.A. examination to show that she has completed graduation. The fake mark-sheet which is alleged to have been furnished by the Party I, and the so called information which is alleged to have been given by the University must be in possession of the Party II. The mark-sheet, which according to the Party II, is the fake mark-sheet, is not produced by the Party II to show that in fact such mark-sheet was furnished by the Party I. The best piece of evidence which was possible to be produced is not produced by the Party II. An adverse inference will have to be drawn against it. Evidence led by the Party II is not clinching and sufficient to hold that the Party I has furnished fake mark-sheet of T.Y.B.A. examination. Therefore I am not prepared to rely upon the said allegation made against the Party I. I hold that the Party I is entitled to challenge such allegation.

37. In case of *Union of India and others, Appellant v/s A. P. Bajpai and others,* Respondents, reported in *(2003) II SCC 433,* termination of services of employee was under Rule 5 (1) CCS (Temporary Service) Rules, 1965. It was order of termination simplicitor. Department's counter-affidavit stated grounds to assess unsuitability of the employee. The Hon'ble Supreme Court held that the grounds stated in the counter affidavit could not be relied upon and that the order of termination of service was simplicitor without attaching stigma to the conduct of the employee.

38. In case of *Dhananjai, Appellant, v/s Chief Executive Officer, Zilla Parishad, Jalna,* Respondent, reported in *(2003) 2 SCC 386,* the appellant was appointed in Zilla Parishad, Jalna, on temporary basis for a period of one year. After expiry of period of one year he was given a fresh appointment for one more year, after giving break for one day. He was placed under suspension on the ground that he had paid an amount of Rs. 18,000/- to a contractor, when the actual cost of repairs was only Rs. 8,000/- In the very suspension order the inquiry was directed in regard to the allegations of payment of Rs. 18,000/- as against payment of actual cost of Rs. 8,000/- spent towards repairs. A complaint was made against him on criminal side in respect of the said allegations. After trial he was acquitted. The respondent passed an order terminating services of the appellant who in turn challenged order by writ petition in the Hon'ble High Court. The Division Bench of the Hon'ble High Court after considering respective contentions of the parties and finding no merit in the writ petition, dismissed the same. Hence the appellant took up the matter on appeal before the Hon'ble Supreme Court. In this reported case, the Hon'ble Supreme Court held that, in the circumstances of the case, it is not possible to hold that the order of termination of service was not simplicitor or that the misconduct was the foundation for passing such order. Even if enquiry was contemplated to find out or verify the truth or otherwise the allegations by itself does not establish that the respondent had any such design to remove appellant from service.

39. Facts of the above two reported cases of *Union of India and others* and of *Dhananjai* are different from that of the present one, because in the present case non-satisfactory performance of the Party I during period of probation as Cashier-cum-Clerk and the misconduct on her part are the foundation for termination of her service.

40. The Party I was not educationally qualified for post of Foreign Exchange Asstt./Cashier which was to be filed in, in establishment of Party II, even then she was appointed by the Party II initially as Vocational Trainee. Explanations given by the Party I that even though she was SSC qualified she was given appointment on basis of her previous experience in hotel Fidalgo appears to be probable. She completed period of one year as Vocational Trainee. Thereafter she came to be appointed as Cashier-cum-Clerk in establishment of the Party II w.e.f. 1-6-1995. There is no documentary evidence on behalf of the Party II to show that letter of appointment to the post of Cashier-cum-Clerk was given to the Party I. The Party II never informed the Party I that performance of the Party I was not satisfactory. The duty which is cast on the employer to inform the employee that performance of the employee is not satisfactory is not discharged by the Party II. There is also no documentary evidence to hold that the Party II had called upon the Party I to complete the graduation for the post of Cashier-cum-Clerk. If there was no such direction there was no reason for the Party I to produce mark-sheet to show that she completed the graduation. Her service came to be terminated by letter dated 26-12-1995 which is just before three days of completion of her probation period of six months from the date of appointment i.e. from 1-6-1995 as Cashier-cum-Clerk. After termination of her service, sister-in-law of the Branch Manager is appointed in the office where the Party I was working. Cumulative effect of all the above circumstances indicate that the Party II had intended to get rid of the services of the Party II without holding inquiry. The grounds especially that of misconduct, given for termination of service of the Party I certainly leads to conclusion that it is not the termination simplicitor but it is the termination which is casting stigma on character of the Party I and which is also punitive in nature. It was necessary for the Party I to hold inquiry into the allegations made against the Party I. Termination of service of the Party I without holding

inquiry is against the protection given to employee under Art. 311 of the Constitution of India. Therefore, the argument advanced by learned advocate of the Party I that the termination of service of the Party I is illegal and unjustified merits consideration.

41. Learned advocate of the Party II tried to fight loosing battle by making submissions that, services of the Party I is terminated due to her unsatisfactory work during probation period as Cashier-cum-Clerk. Such termination is neither retrenchment nor illegal. In this context he relied upon decision given by the Hon'ble High Court of Andhra Pradesh in case of *Vijaylakshmi Insecticide and Pesticides Ltd., Petitioner, v/s Chairman, Industrial Tribunal-cum-Labour Court, Visakhapatnam & ors., Respondents, reported in 2004 I CLR 866.* In this reported case respondents trainees had worked for training period. Subsequently, the management reviewed their performance and extended their training. The management was not satisfied with the performance even in the extended period. Ultimately the management terminated services of these trainees. The Hon'ble High Court of Andhra Pradesh held that the termination is neither retrenchment nor illegal. Decision from case of *management of M/s. City Elimator v/s Presiding Officer, Industrial Tribunal III reported in 2003 (98)* FLR 53 that an employee of the petitioner company does not fall within the definition of workman as referred by the Hon'ble High Court of Andhra Pradesh in *Vijaylakshm'si case.* Here-in, the present case the Party II neither brought to notice of the Party I that performance of the Party I was not satisfactory nor performance of the Party I is reviewed. Moreover, termination of the service of the Party I is not merely on the ground of her non-satisfactory performance but also on the ground of misconduct. These facts are totally different from that of the Vijayalakshmi's case reported in 2004 I CLR 866. Decision from this reported case is not applicable to hold that the termination of service of the Party I is neither retrenchment nor illegal. Argument advanced by learned advocate of the Party II must fail. In view of these reasons and above discussion, I hold that case made out by the Party I appears to be more probable, convincing and acceptable then that of the Party II. I, therefore, answer the issue in affirmative.

42. *Issue No. 2:* The Party II in para No. 6 of written statement contended that the Party I was appointed as Cashier-cum-Clerk w.e.f. 1-6-1995 on probation for period of six months. Further, there is a contention in para No. 12 of the written statement that the service of the Party I is terminated in terms of clause Nos. 1 & 3 of the letter of appointment. The contentions raised by the Party I in its written statement are supported by the witness Miss Maharukh Dosabahi in her affidavit (Exb. 15).

43. The Party I was initially appointed as Vocational Trainee under Vocational Trainee Scheme introduced by the Party II. The appointment as Vocational Trainee was for a period of one year. This fact is supported by xerox copy of appointment letter dated 6-5-1994 produced at Exb. E-2. There appears signature of the Party I at the end of the contents in this letter. It follows that the letter of appointment as Vocational Trainee was given to the Party I. Since the appointment of the Party I at the initial stage as Vocational Trainee was only for a period of one year, evidence led by the Party II that after the period of one year as Vocational Trainee was over, the Party I was given a fresh appointment as Cashier-cum-Clerk under appointment letter dated 26-5-1995 (Exb. E-6) for a period of six months w.e.f. 1-6-1995 appears to be probable. I, therefore, hold that the Party I was probationer since after her appointment as Cashier-cum-Clerk.

44. It appears from affidavit filed by the witness, Miss Maharukh Dosabahi which is at Exb. 15 that the service of the Party I is terminated in terms of clause Nos. 1 & 3 stated in the appointment letter dated 26-5-1995 (Exb. E-6). These two clauses are already reproduced above. There is no evidence except affidavit of witness Miss Maharukh Dosabai who is interested witness to show that the Party I did not attend the standard required by the company as to her work, attendance and conduct. Even for the sake of argument assuming that the Party I did not perform to satisfaction of the Party II, there is no evidence to hold that before termination of service of the Party I, a notice of 24 hours is given by the Party II. Letter of termination of service of the Party I and which is dated 28-8-1995 coupled with subsequent letter dated 26-12-1995 (W-5) makes it clear that the Party II has assigned reasons for termination of service of the Party I during probationary period, I therefore, hold that the termination of service of the Party I is not in terms especially in terms of clause Nos. 1 & 3 set out in the letter of appointment dated 26-5-1995 (Exb. E-6).

45. *Issue No. 3:* It appears from affidavit of witness Miss Maharukh Dosabai that the Party I is gainfully employed after termination of her service. The Party I is earning nearabout Rs. 10,000/- per month. The Party I has purchased Maruti Van GA01 R4897 in the name of her husband Minguel Menezes by obtaining loan from ICICI Bank Ltd., Panaji Branch. The Party I is making payments through monthly installments towards repayment of the bank loan in the name of her husband.

46. The witness Miss Maharukh Dosabhai did not disclose in her affidavit as to where the Party I is in service. There is absolutely no documentary evidence on behalf of the Party II to support that the Party I is gainfully employed. Evidence led by the Party II is not sufficient and convincing, I, therefore, do not accept it. My answer to the issue is in negative.

47. *Issue No. 4:* Section 11A of the Industrial Disputes Act, 1947 lays down that:

> *"Where an industrial dispute relating to the discharge or dismissal of a workmen has been referred to a Labour Court, Tribunal or National Tribunal for adjudication and, in the course of adjudication proceedings, the Labour Court,*

Tribunal or National Tribunal, as the case may be, is satisfied that the order of discharge or dismissal was not justified, it may, by its award, set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require."

48. I am satisfied that termination of service of the Party I is illegal and unjustified. Therefore, the Party I is certainly entitled to get benefit of the provisions contained in Section 11-A of the said Act, 1947.

49. Learned advocate of the Party II pointed out in his argument that the Party I has voluntarily given resignation on 13-6-1996. Therefore, it will not be proper and correct to direct the Party II to reinstate the Party I in service with full back wages and benefits.

50. The Party II did not produce the said letter dated 13-6-1996. Service of the Party I is terminated by letter dated 28-8-1995 with immediate effect. When there is such termination, case made out by the Party II that the Party I voluntarily left the services under letter dated 13-6-1996 does not appear to be probable and acceptable. Explanation given by the Party I that she was in dire need of money, that, without such letter the Party II was not ready to settle the dues payable to her, and therefore, she has given such letter dated 13-6-1996 to the Party II appears to be probable and convincing. I therefore, do not agree with argument advanced by learned advocate of the Party II. The way in which she is made to be out of service by the Party II is of such nature which will certainly entitle her to claim the back wages with consequential benefits. I, therefore, answer the issue in affirmative.

As a result of findings given to the issue Nos. 1 and 4, I proceed to adjudicate the reference by passing order as follows:-

ORDER

1. The action of the Management of M/s. Thomas Cook (India) Ltd., Panaji, Goa in terminating services of M/s. Yvonne Menezes, Cashier-cum--Clerk w.e.f. 30-9-1995 is not legal and justified.

2. Termination of service of M/s. Yvonne Menezes, Cashier-cum-Clerk by the Management of M/s. Thomas Cook (India) Ltd., Panaji, Goa, w.e.f. 30-9-1995 is hereby set aside.

3. The Party II, M/s. Thomas Cook (India) Ltd., Panaji, Goa is directed to reinstate the Party I, Mrs. Yvonne Menezes, Cashier-cum-Clerk in the service with full back wages and with consequential benefits.

4. No order as to cost.

5. Award be forwarded to the Government of Goa as per provisions contained in Section 15 of the Industrial Disputes Act, 1947.

Sd/-
(Dilip K. Gaikwad),
Presiding Officer,
Industrial Tribunal-Cum-
-Labour Court-I.

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